

MACDONALD | FERNANDEZ LLP
IAIN A. MACDONALD (SBN 051073)
221 Sansome Street, Third Floor
San Francisco, CA 94104-2323
Telephone: (415) 362-0449
Facsimile: (415) 394-5544

Attorneys for Creditor U.S. TELEPACIFIC CORP.
dba TPx COMMUNICATIONS

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE

PG&E CORPORATION,

Debtor.

Case Nos. 19-30088-DM
19-30089-DM

Chapter 11

IN RE:

PACIFIC GAS AND ELECTRIC
COMPANY,

Debtor.

OBJECTION OF U.S. TELEPACIFIC CORP. dba
TPX COMMUNICATIONS TO DEBTOR'S
MOTION TO PROVIDE ADQUATE
ASSURANCE TO UTILITY PROVIDERS (DKT.
NO. 32); DEMAND FOR ADEQUATE
PROTECTION

Date: February 27, 2019

Time: 9:30 a.m.

Place: Courtroom 17, 16th Flr.
450 Goldengate Avenue
San Francisco, CA
Hon. Dennis Montali

COMES NOW U.S. TelePacific Corp. dba TPx Communications ("U.S. TelePacific") and
objects to the Motion of PG&E, Debtor herein, for Approval of Its Proposal for Adequate Assurance
Payment to Utility Providers (Dkt. No. 32) ("Motion") and respectfully represents:

INTRODUCTION

U.S. TelePacific Corp. dba TPx Communications is party to a Master Agreement dated
March 11, 2015 (the "Agreement") with the PG&E to provide high quality and extensive IDM,

1 internet and related services (Neal Declaration, Ex. “A”). The average monthly billing is
2 approximately \$53,000.00 (*Id.* at 2:1). On the Petition Date, PG&E was indebted to U.S. TelePacific
3 in the amount of \$51,711.00 (*Id.*). Pursuant to the Agreement, and course of dealing between the
4 parties, the average billing cycle is monthly, payable net sixty (60) days from the date of the bill, and
5 PG&E generally pays within thirty (30) days. Accordingly, U.S. TelePacific finds the proposed two-
6 week adequate protection “deposit” inadequate to protect U.S. TelePacific in the event of a default at
7 the end of the 60-day period, during which time two months’ additional charges will have accrued.
8 U.S. TelePacific proposes that PG&E be ordered to pay within thirty (30) days, and that the amount
9 of the “deposit” be increased to sixty (60) days’ charges. Average monthly charges are \$57,000.00,
10 a deposit of \$114,000.00 (two months’ charges) will protect U.S. TelePacific in the event that PG&E
11 defaults at the end of the proposed reduced billing cycle.

12 Equally significant, U.S. TelePacific objects to PG&E’s proposal to “deposit” a two-week
13 payment with itself. A commercially acceptable security deposit must be perfected in accordance
14 with the California Commercial Code, that is, either place the deposit directly with U.S. TelePacific
15 or place U.S. TelePacific in a position of “control” over the account. California Commercial Code
16 Sections 9312(b)(1), 9314, 9104(a)(2).

17 **ARGUMENT**

18 **I. LACK OF EVIDENTIARY SUPPORT FOR ADEQUATE PROTECTON.**

19 PG&E’s only attempt to provide evidence to support its Motion is an oblique reference to the
20 voluminous “Wells Declaration”, which does not direct the reader to the particular part of the Wells
21 Declaration upon which it relies. (PG&E’s Motion, 6:14-18). There is no evidence to support the
22 contention of PG&E’s “good payment history,” although this is irrelevant, 11 U.S.C. §366(3)(B)(ii).
23 (PG&E’s Motion, 7:1-6). There is no evidence to support the contention that the thirty (30) day cost
24 of utility service will be approximately \$8.6 million (PG&E’s Motion, 7:6), that the appropriate
25 Adequate Assurance Deposit is \$4.8 million (PG&E’s Motion, 8:16), or that PG&E has adequate
26 funds for day-to-day expenses and post-petition amounts for utility services and the deposit.
27 (PG&E’s Motion, 8:4-6). PG&E provides no information about the terms and conditions under
28 which the deposits will be held by them, nor whether U.S. TelePacific will be freely able to enforce

1 its rights, without interference, in the event of default. Nor is there any indication that U.S.
2 TelePacific will be able to seek modification should circumstances change. U.S. TelePacific notes
3 that PG&E bounced its last check to it in the amount of \$51,711.00 (Neal Declaration, 2:2-3).

4 The significance of the evidentiary gaps in PG&E's Motion is that it renders its
5 representations regarding Adequate Protection dubious because they cannot be verified. It is for this
6 reason that U.S. TelePacific demands that a cash deposit equal to sixty (60) days' charges be
7 deposited with U.S. TelePacific.

8 **II. THE PG&E MOTION DOES NOT COMPLY WITH CURRENT LAW.**

9 In the absence of an agreement with the utility, PG&E must provide either a cash deposit, a
10 letter of credit, a certificate of deposit, a surety bond or a pre-payment. 11 U.S.C. §366(c)(1).
11 PG&E proposes none of those things. Indeed, PG&E did not contact U.S. TelePacific at any time
12 prior to or after the filing of the Motion to discuss an agreement. Based on the statute, U.S.
13 TelePacific is entitled to a cash deposit or something similar. PG&E is well familiar with this
14 practice as it receives and holds cash deposits from new customers. (See, *PG&E's Motion*
15 *Authorizing Debtors to (A) Maintain and Administer Customer Programs, Including Public Purpose*
16 *Programs, and (B) Honor any Prepetition Obligations Relating Thereto; and (II) Authorizing*
17 *Financial Institutions to Honor and Process Related Checks and Transfers* regarding customer
18 deposits, Dkt. No. 16). Segregating the money in an interest-bearing account which PG&E holds it is
19 not what is contemplated by a "cash deposit." To constitute a "deposit" it should be paid to and held
20 by the party to be benefited, here, U.S. TelePacific.

21 Moreover, *Va. Elec. & Power Co. v. Caldor, Inc.*, 117, F3d 646 (2nd Cir. 1997), is not a
22 statement of current law, having been legislatively overruled by the enactment of Section 366(c).
23 This case was a statement of pre-2005 amendments law and recognize the right of the Bankruptcy
24 Court to dispense with the requirement of a deposit as adequate assurance of payment. (PG&E
25 Motion, 11:22-25).

26 Section 366 was amended by the 2005 Amendments to the Bankruptcy Code, which added
27 Section 366(c) and made a conforming amendment to 366(a). Section 366(c) created new limits on
28 the methods by which a chapter 11 debtor may provide adequate assurance and gave utilities greater

1 rights in chapter 11 cases. (Pub. L. No. 109-8 (2005) effective with respect to cases filed on or after
2 October 17, 2005.) However, as also noted by PG&E, 366(c) does not give the Bankruptcy Court
3 discretion to modify the express requirements of 366(b).

4 Moreover, PG&E's reference to its alleged pre-payment history is irrelevant, as
5 366(c)(3)(B)(ii) prohibits the court from taking this into consideration.

6 **III. THE PROPOSED "DEPOSIT" IS ILLUSORY BECAUSE IT DOES NOT**
7 **PROVIDE U.S. TELEPACIFIC CORP. WITH A PERFECTED SECURITY**
8 **INTEREST.**

9 A commercially acceptable security deposit must be perfected in accordance with the
10 California Commercial Code, that is, either place the deposit directly with U.S. TelePacific or place
11 U.S. TelePacific in a position of "control". California Commercial Code Sections 9312(b)(1), 9314,
12 9104(a)(2). The PG&E proposal provides that PG&E will retain custody and control of the deposit,
13 giving neither to U.S. TelePacific. This does not comply with the California statutes with respect to
14 perfection of a security interest, nor does it comply with the definition of "cash deposit," because
15 PG&E is not depositing the money with anyone, simply keeping it in its possession.

16 There is no procedure for U.S. TelePacific to retrieve the amount of the unpaid charges and,
17 moreover, nothing to assure that the amount of the deposit will cover the unpaid charges of the many
18 utilities because, as indicated in the following section, the proposed deposit does not take into
19 account additional unpaid charges that may arise during the billing cycle.

20 **IV. THE PROPOSED ADEQUATE PROTECTION PAYMENT IS INADEQUATE.**

21 PG&E's proposal to make an adequate protection payment equal to a two-week charge is
22 inadequate because, as indicated above, the average billing cycle is monthly, with payments not due
23 for sixty (60) days. PG&E generally pays in less than thirty (30) days. Additional charges accrue in
24 the meantime to all utilities. For this reason, it will be sixty (60) days before PG&E might default,
25 leaving U.S. TelePacific at risk for the unpaid payment plus two additional months. At monthly
26 billing of \$57,000.00, the total exposure to U.S. TelePacific is as much as \$228,000.00. (Neal
27 Declaration). A deposit of anything less is not "adequate" for purposes of Section 366.

28 ///

///

1 **CONCLUSION**

2 PG&E is a good customer of U.S. TelePacific and it is hoped that it continues as such. U.S.
3 TelePacific desires what it is entitled to under Section 366, and requests the following relief:

- 4 1. That PG&E be ordered to pay invoices within thirty (30) days;
- 5 2. For a cash deposit of \$114,000.00, to be held by U.S. TelePacific Corp., as security
6 for payment of statements unpaid after thirty (30) days;
- 7 3. PG&E must timely pay all of its post-petition charges in full, when due, including the
8 amount of the dishonored check of \$51,711.00 and all charges on other post-petition Service
9 Invoices thereafter; and
- 10 4. If PG&E does not pay all amounts due and all charges on other post-petition Service
11 Invoices, then U.S. TelePacific Corp. may collect such amounts from the cash deposit and terminate
12 service.

13
14 Dated: February 20, 2019

MACDONALD | FERNANDEZ LLP

15 By: /s/ Iain A. Macdonald

16 Iain A. Macdonald, Attorneys for Creditor
17 U.S. TELEPACIFIC CORP.
18 dba TPx COMMUNICATIONS
19
20
21
22
23
24
25
26
27
28